No. 00-___ (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GREENVILLE WOMEN'S CLINIC; CHARLESTON WOMEN'S MEDICAL CLINIC, INCORPORATED; WILLIAM LYNN, M.D., on behalf of themselves and their patients seeking abortions,

Petitioners,

—v.—

DOUGLAS E. BRYANT, in his official capacity as Commissioner of South Carolina Department of Health and Environmental Control; CHARLES M. CONDON, in his official capacity as Attorney General of the State of South Carolina; GOVERNOR OF SOUTH CAROLINA,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an appellate court considering the constitutionality of an abortion restriction must defer to the factual findings of the district court unless it sets them aside as clearly erroneous.

2. Whether a State violates the equal protection clause when it discriminates against abortion providers and their patients by subjecting them to regulations not imposed upon providers of comparable medical procedures, where those regulations bear no relationship to differences between abortion and those unregulated medical procedures.

3. Whether a state regulation of abortion that threatens maternal health and patient confidentiality while causing substantial and medically unnecessary increases in the cost of abortions violates the right to privacy.

LIST OF PARTIES

The Petitioners are Greenville Women's Clinic, Charleston Women's Medical Clinic, Incorporated, William Lynn, M.D., on behalf of themselves and their patients seeking abortions. None of the Petitioners are publicly-held corporations or corporations owned by parent corporations.

The Respondents are Douglas E. Bryant, in his official capacity as Commissioner of South Carolina Department of Health and Environmental Control, Charles M. Condon, in his official capacity as Attorney General of the State of South Carolina, and the Governor of South Carolina.[1]

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[1] The Governor of South Carolina appealed only the district court's award of attorney's fees and costs, not the judgment on the merits.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit entered on August 15, 2000, which upheld the constitutionality of South Carolina Annotated Regulations 61-12 (West Supp. 1998) (Regulation 61-12" or "the Regulation").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 222 F.3d 157. The opinion of the United States District Court for the District of South Carolina is reported at 66 F. Supp.2d 691.[2]

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on August 15, 2000. A petition for rehearing en banc was denied by a 5-3 vote on September 25, 2000. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, which provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

S.C. Code Ann. § 44-41-75 (Law Co-op Supp. 1997), which provides:

(A) A facility in which any second trimester or five or more first trimester abortions are performed in a month must be licensed by the department to operate as an abortion clinic and must comply with the provisions of Article 3.

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[2] The opinions and regulation involved are reprinted in the Appendix to this Petition. Citations to this Appendix are made to the page number therein as "A_."

(B) The department shall promulgate regulations concerning sanitation, housekeeping, maintenance, staff qualifications, emergency equipment and procedures to provide emergency care, medical records and reports, laboratory, procedure and recovery rooms, physical plant, quality assurance, infection control, and information on and access to patient follow-up care necessary to carry out the purposes of this section.

S.C. Code Ann. Regs. 61-12 (West Supp. 1998). A205-60.[3]

STATEMENT OF THE CASE

I. Introduction.

This case challenges a South Carolina regulatory scheme that singles out first-trimester abortion providers and their patients for the imposition of burdensome and medically unnecessary health regulations that have no more relevance to abortion than to numerous, comparable, unregulated medical procedures currently provided in physician's offices and outpatient clinics. South Carolina's scheme is part of a recent wave of laws adopting regulations that impose medically unnecessary costs and requirements on the provision of abortion. *See, e.g.*, Ariz. Rev. Stat. §§ 36-402, 36-499.02; La Rev. Stat. §§ 40:2131, *et seq.*, 40:2134; Tex. Health & Safety Code §§ 245.002-.005, 245.009-.010. Under the guise of promoting maternal health, these regulations actually threaten women's health by significantly hindering their access to safe, legal abortions. These regulations also subject abortion to unique levels of government intrusion and oversight, making it virtually impossible for physicians to provide abortions in their offices as part of their medical practice, and relegating abortions to separate facilities designed for more complex surgery. They represent a concerted attempt to chip away at the right to

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[3] Specific sections of S.C. Code Ann. Regs. 61-12 are cited as "§_."

abortion at the expense of the health of the over one million women who seek safe, legal, previability abortions in this country every year.

II. Background.

Petitioners provide first-trimester abortions in South Carolina. Drs. Buffkin, Campbell, Lynn and Manning are each licensed to practice medicine in South Carolina and board certified in obstetrics and gynecology. Petitioner Greenville Women's Clinic ("GWC") is a medical practice in Greenville owned and operated by Drs. Buffkin and Campbell. Petitioner Dr. Lynn owns and operates medical practices in Greenville and Beaufort. Petitioner Charleston Women's Medical Clinic ("CWMC") is a clinic in Charleston, of which Dr. Manning serves as medical director. GWC, Dr. Lynn's two practices and CWMC all provide a range of gynecological services, including first-trimester, suction curettage abortions. A104-05. GWC also provides first-trimester medical abortions. A123.

The district court found that first-trimester suction curettage abortion is one of the safest medical procedures performed. A148-49; *see also* A300-01 (Buffkin 45:21-46:5); A324-25 (Grimes 718:9-15). The procedure involves dilating the cervix and removing the contents of the uterus with a suction catheter. A122. This procedure lasts approximately two to five minutes, has a low complication rate, and is commonly and safely provided in physicians' offices and outpatient clinics. A122, 148; *see also* A261-62 (American College of Obstetricians & Gynecologists, *Standards: Obstetric-Gynecological Services* (1989) ("ACOG Standards")), A277 (American College of Obstetricians & Gynecologists, *Guidelines for Women's Health Care* (1996) ("ACOG Guidelines")); A300 (Buffkin 45:4-18); A301-06 (Buffkin 47:5-53:12); A327 (Grimes 720:19-25). The district court noted that serious complications resulting from suction curettage are "rare" and

that in terms of mortality, the procedure is twenty-five times less risky than carrying a pregnancy to term. A122; *see also* A279 (ACOG Guidelines); A300 (Buffkin 45:4-18). The district court also found that first-trimester medical abortion is even safer, involves only an injection, and can be safely performed in a physician's office or outpatient clinic. A123, 148; *see also* A326-27 (Grimes 719:18-720:17).

The district court recognized South Carolina's excellent abortion safety record, finding that the state's abortion complication rates were at least as good as national rates, and that the state was not experiencing any public health problem related to abortion. A149-50; *see also* A328 (Grimes 722:16-723:1). The district court also found a complete lack of evidence that "plaintiffs or any other abortion providers in South Carolina are providing inadequate care to women seeking abortions." A149.

The district court found that first-trimester surgical abortions "are comparable in terms of risks, duration and invasiveness" to a variety of procedures that are frequently performed in physicians' offices in South Carolina. A137, 149; *see also* A325 (Grimes 718:12-19). Those comparable procedures include "curettage procedures performed on women who have experienced an incomplete spontaneous abortion, dilation and curettage procedures, endometrial biopsies, hysteroscopies, and insertion of intrauterine devices for birth control," as well as "the removal of subcutaneous lipomas and cysts, minor breast biopsies, and the removal of implanted ports and catheters which have been inserted into large veins in the neck and collarbone region for use in administering chemotherapy and dialysis." A149; *see also* A325-27 (Grimes 718:19-719:7; 720:12-18); A312 (Fass 332:24-333:12); A312-14 (Fass 337:23-339:23).

III. Promulgation of the Regulatory Scheme.

South Carolina does not require licensing of any physician's office or clinic outside the context of abortion. A108. Thus, unless physicians provide abortions, they "are not subject to [Department of Health and Environmental Control ("DHEC")] regulation, but rather are governed by the South Carolina State Board of Medical Examiners." A108. Prior to 1995, South Carolina only required licensing of physicians' offices and clinics in which second-trimester abortions were performed. No physician provides elective, second-trimester abortions in South Carolina. A122. In 1995, the South Carolina legislature began requiring licensing of any "facility in which any second-trimester or five or more first-trimester abortions are performed in a month," and directed DHEC to promulgate regulations for such facilities. S.C. Code Ann. § 44-41-75 (Law Co-op Supp. 1997). The legislature gave DHEC discretion to determine the substance and level of regulation and penalties to impose. A193. DHEC subsequently promulgated the Regulation, twenty-seven pages of requirements with which a medical practice must comply in order to obtain a license and be able to perform five or more first-trimester abortions per month. A106-07. These requirements cover such matters as the facility's administration, staffing, physical plant, equipment, policies and procedures, and patient testing, and include licensing, inspection, and penalty provisions to which abortion providers are subject. *See generally* A109-21.

The district court made extensive factual findings regarding the inadequacies of DHEC's drafting and promulgation process for Regulation 61-12. A124-133, A150-53. For example, the district court found that the drafters were not trained in medicine, knew little or nothing about abortion, and did not attempt to tailor the Regulation to the particular needs of abortion patients. *See generally* A124-133, A150-53; *see also, e.g.,* A337 (Lafferty 780:4-

24).[4] The district court also found that the drafters, rather than considering the needs of abortion patients, based much of the Regulation on other DHEC regulations governing medical facilities in which other types of procedures are performed. A126-29, A150-52; *see also* A322 (Samuels 629:3-7). DHEC included these provisions in order to standardize its regulations and without considering whether the provisions would promote the safety of abortion. A126-30; A150-53; *see also* A339-41 (Moore 838:7-839:4, 839:22-840:4). The district court also found that DHEC failed to consider the costs of compliance with the Regulation and the impact of those costs on the availability of abortion services in South Carolina. A152-53. On the basis of all these findings, the district court concluded that DHEC did "not tailor[] [the Regulation] to further the state's legitimate interest in preserving and protecting the health of women seeking first trimester abortions and . . . took no meaningful steps to ensure that it would serve that purpose." A124.

The district court recognized that some of the drafters reviewed guidelines promulgated by the American College of Obstetricians and Gynecologists ("ACOG"), the National Abortion Federation ("NAF"), and Planned Parenthood Federation of America, Inc. ("PPFA"). Importantly, though, after comparing the Regulation with the ACOG, NAF and PPFA guidelines and hearing expert testimony on the issue, the district court found that the Regulation "in fact *far exceeded* even those guidelines." A129 (emphasis added); *see also* A152. The district court also noted that DHEC disregarded a letter it received from ACOG during the drafting process, in which ACOG "express[ed] concern that the requirements of the regulation would not enhance patient well-being or safety and offer[ed] DHEC the assistance of ACOG in the drafting of an appropriate regulation." A130;

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[4] The drafters did not direct the Regulation toward protecting potential life. A322-23 (Samuels 634:16-635:2); A342 (Moore 845:11-846:5).

see also A283-87 (May 3, 1995 letter from ACOG to DHEC ("ACOG letter")).The district court also found that the national guidelines "are recommendations by the respective organizations and are not fairly characterized as mandated standards of care which can or should be imposed upon licensed physicians as regulatory requirements," A152; *see also* A270 (ACOG Guidelines); A335-36 (Grimes 756:8-22; 757:13-16); rather, those recommendations "must be accommodated to the needs of a particular facility and its patients through the exercise of physician judgment and discretion." A129; *see also* A152.

IV. The Regulation's Departure From Accepted Medical Practice.

The district court found that the Regulation is riddled with medically unnecessary requirements that depart from accepted medical practice. *See generally* A153-161. For example, contrary to the Regulation's requirements, it is within accepted medical practice for physicians who provide first-trimester abortions: (1) to perform only indicated tests on their abortion patients, rather than performing sexually transmitted disease tests on every patient regardless of her history and circumstances, A157; *see also* A307-08 (Buffkin 70:16-71:25); A330-31 (Grimes 728:3-19); A334-35 (Grimes 746:9-24); (2) to supervise the provision of nursing care without hiring a registered nurse to do so, A160; *see also* A320-21 (Morphis 556:4-18; 557:13-20; 572:20-573:1); (3) to provide abortion procedures in an office that does not have special air exchange rates, a recovery area separate from its procedure rooms or emergency call buttons in its bathrooms, A160; *see also* A331-33 (Grimes 728:20-729:10; 730:2-23; 732:6-10); and (4) to rely on unwritten or informal policies and procedures rather than extensive formal written policies and procedures if they work in close contact with their staff, A156; *see also* A329-30 (Grimes 726:13-727:12); A332-33 (731:5-19).

V. The Regulation's Impact on Maternal Health.

Given the lack of any medical necessity for many of the regulation's requirements, the district court concluded that the Regulation will threaten, rather than promote maternal health by unjustifiably interfering with women's timely access to abortion services. A151-53, A148, A182. Specifically, after reviewing "all of the evidence," the district court found "as a fact that compliance with Regulation 61-12 will be a costly endeavor which will result in a substantial rise in the cost of abortion services." A147, *see also* A152-53.[5] Based on estimates prepared by Petitioners, stipulations of both parties as to testing costs, and expert testimony, the district court found that enforcement of the Regulation would result in a range of price increases over the existing prices of $325 and $480[6] for a first-trimester abortion in South Carolina. The district court found that these price increases would be: "between $36.48 to $75.03" at CWMC, "between $93.09 and $170.39" at Dr. Lynn's Greenville office, "between $115.67 and $367.50" at Dr. Lynn's Beaufort office, and between "$22.68 and $32.39" at GWC. A146. The district court further found that "the substantial alterations that Dr. Lynn must undertake in his practice, and the resulting extraordinary per procedure cost (even by defendants' estimate) will likely force him to cease performing abortions in his Beaufort office and, thereby, eliminate entirely the availability of abortions in this area of the state." A147; *see also* A310-11 (Lynn 248:20-249:15).

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[5] The district court explicitly found that "[a]s with any other business, . . . costs [of complying with the regulation] will be passed along to the patients in the form of increases in the price of receiving abortion services." A145.

[6] Current prices for a first-trimester abortion vary, "depending upon the gestational age, the type of sedation or anesthesia needed, and the medical testing indicated." A145-46.

The district court also made specific findings of fact as to how these price increases would affect women seeking abortions. The district court concluded: (1) "that the increased cost of providing abortions resulting from the regulation will prevent a significant number of women from obtaining an abortion or, at a minimum, delay them from obtaining the abortion, both of which carry increased risks to the health of women;" A148; *see also* A152-53; A308-09 (Buffkin 83:12-84:4); A316-17 (Campbell 366:13-367:2; 388:24-389:12); A318-19 (Maguire 486:7-487:11); A330 (Grimes 727:6-12); A333-34 (Grimes 733:3-25); A352-56 (Henshaw 45:6-49:11); and (2) that "increasing the distance a woman has to travel to obtain an abortion increases the costs for the woman, again resulting in delay or the inability to obtain an abortion." A183; *see also* A140; A345-46 (Henshaw 20:20-21:19; 22:12-23:8); A348-50 (Henshaw 27:21-30:10). Finally, the district court found that the Regulation imposes additional burdens by granting DHEC unfettered authority to inspect licensed facilities, allowing the agency to copy and remove patient medical records (in which the patient must disclose her husband's name), permitting anonymous third parties to make complaints that trigger investigations of licensed facilities, and intruding on the patient's relationship with her physician and family. A183-84.

VI. Procedural Background.

Petitioners filed suit in 1996 for declaratory and injunctive relief, claiming *inter alia*, that Regulation 61-12 violates Petitioners' right to equal protection and Petitioners' patients' rights to equal protection and due process.[7] After a six-day bench trial, the district court granted judgment in Petitioners' favor. Respondents appealed to the United

[7] Petitioners' complaint stated four causes of action that were not considered by the district court. If this petition is denied, this case should be remanded to the district court for initial consideration of those claims.

States Court of Appeals for the Fourth Circuit, which reversed the district court by a 2-1 vote. Petitioners' petition for rehearing *en banc* was denied by a 5-3 vote. A202. On October 6, 2000, the panel that issued the decision below granted Petitioners' motion to stay the Fourth Circuit's mandate pending the timely filing of a petition for writ of certiorari in this Court.

REASONS FOR GRANTING THE WRIT

South Carolina's discriminatory and harmful regulatory scheme conflicts with this Court's equal protection and privacy jurisprudence. It creates a classification that disadvantages a politically unpopular group yet is not tailored to the object to be obtained, and it intrudes unjustifiably on a woman's right to abortion.

Unlike laws that require a "waiting period," "informed consent" or "parental involvement" in connection with the abortion decision, *see, e.g., Planned Parenthood v. Casey,* 505 U.S. 833 (1992), *Hodgson v. Minnesota,* 497 U.S. 417 (1990), Regulation 61-12 is unrelated to the state's interest in potential life, and purports to promote only the state's interest in maternal health. While this Court has allowed states to express a preference for childbirth over abortion, it has firmly protected physicians' ability to exercise appropriate medical judgment when providing abortion care to patients. *See, e.g., Stenberg v. Carhart,* 120 S. Ct 2597 (2000). Moreover, this Court has never granted the states authority to regulate abortion provision differently than comparable medical practices with respect to "health regulations." This Court has also repeatedly affirmed that purported health regulations applied to abortion must not depart from accepted medical practice or impose unnecessary restrictions and costs.

Following these principles, the district court struck down Regulation 61-12. The district court concluded that the Regulation: violates equal protection because it lacks even a rational basis for its differential treatment of abortion and

comparable medical procedures; threatens rather than protects maternal health; and imposes an undue burden on women's right to seek a previability abortion. The Fourth Circuit reversed, ignoring and even contradicting the district court's factual findings, without setting a single one of them aside as clearly erroneous.

Petitioners do not claim that the state may not regulate the provision of abortions. Nor do they claim that all state laws must treat abortion like any other medical procedure. Rather, Petitioners argue that if the state regulates physicians' provision of abortion services in the name of protecting patient health (rather than potential life), it must: (1) formulate such regulations in a non-discriminatory manner so that they apply equally to providers of comparable medical care; and (2) adopt regulations that are sufficiently tailored to accepted medical practice and give the physician sufficient flexibility to exercise his or her medical judgment so that the regulations further, rather than harm, patient health. The Fourth Circuit's decision would impose no such limitations on the state's power. Instead it grants the states blanket permission to discriminate against abortion in their laws, regardless of the interests the laws purport to serve. Moreover, under the Fourth Circuit's ruling, any law that looks like a "health regulation" will be upheld regardless of whether it serves or threatens maternal health.

I. The Fourth Circuit's Disregard of the District Court's Factual Findings Conflicts With Decisions of This Court, and Departs From the Accepted and Usual Course of Judicial Proceedings.

It is well established that appellate courts must give deference to trial court findings of fact, setting them aside only if they are clearly erroneous. Fed. R. Civ. P. 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273, 292-293 (1982) (reversing because appellate court made its own determination of factual issue without declaring district

court's findings clearly erroneous); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 858 (1982) (reversing because "[t]he Court of Appeals erred in setting aside findings of fact that were not clearly erroneous"); *id.* at 857-858 ("An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction [or] resolve the ambiguities differently.") (quotation omitted). The importance of adherence to this rule is heightened where facts play a crucial role in the determination of constitutional rights, such as in evaluating whether the right to abortion has been unconstitutionally infringed. *See, e.g., Carhart*, 120 S. Ct. at 2610-12; *Casey*, 505 U.S. at 888-894; *Hodgson*, 497 U.S. at 437-444, 450-451; *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 448 (1983).

The decision of the court below violates these basic principles of the federal appellate process. As noted by the dissent, the court below wholly ignored the district court's extensive factual findings, failing to hold any of those findings clearly erroneous, and instead drew numerous of its own contrary factual conclusions. A36 (Hamilton, J., dissenting). These substituted factual "findings" of the court below formed the basis for its decision to uphold the Regulation. Three examples of the Fourth Circuit's rampant substitution of its own factual theories for the district court's findings are illustrative.

(1) Despite the district court's finding that the Regulation "far exceed[s]" the requirements of national medical guidelines, A129, A152, the Fourth Circuit found that the Regulation "largely tracks" national medical standards and guidelines. A20; *see also* A23. This is simply wrong. As a preliminary matter, South Carolina's adoption of the Regulation conflicts with the positions of both ACOG and NAF. Not only do ACOG's guidelines recognize that first-trimester abortions may safely be performed in

physicians' offices and outpatient clinics, A262-63, 265 (ACOG Standards); A277, 279 (ACOG Guidelines), ACOG issued a letter to DHEC, expressing its concerns that the Regulation's requirements were medically unnecessary and burdensome, and stating that the Regulation should not apply to abortions performed prior to eighteen weeks gestation. A283-87 (ACOG Letter). NAF also takes the position that targeting abortion providers for an additional layer of regulation is not medically appropriate:

> In the United States, more than 90% of all abortions are performed in outpatient facilities, such as physicians' offices and clinics. . . . There is no evidence that abortions would be safer in another setting, nor that abortions are performed inadequately in outpatient facilities. . . . Regulations that codify minimum guidelines for the provisions of quality abortion services are appropriate only to the same extent as for other outpatient medical care.

A290-91 (NAF, *A Resource for NAF Members Faced With Legislative Bodies or Regulatory Agencies Proposing Regulation of Abortion Service*).

Moreover, the attempt by the court below to identify similarities between the Regulation and national guidelines, A20-21, only highlights the significant differences between the two. For example, while the Regulation requires testing for chlamydia and gonorrhea on every single abortion patient regardless of her medical history, A231 (§ 304(C)), the ACOG guidelines and NAF and PPFA standards[8] instruct

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[8] Because the PPFA standards are not generally applicable medical guidelines, but mandatory requirements with which Planned Parenthood affiliates must comply, *see* A129, those standards are not relevant here. Petitioners discuss those standards only to demonstrate the inaccuracy of the Fourth Circuit's suggestion that those standards support the Regulation's requirements. Also, the PPFA standards in the record do not

that sexually transmitted disease testing should be performed on the basis of risk factors. A265 (ACOG Standards); A280-81 (ACOG Guidelines); A289 (Planned Parenthood Federation of America, Inc., *Manual of Medical Standards and Guidelines* ("PPFA Standards")); A295 (National Abortion Federation, *Standards for Abortion Care* (1988) ("NAF Standards")). Further, while the Regulation requires that a registered nurse supervise nursing care, A223-24(§205(D)), the ACOG guidelines and NAF and PPFA standards all permit a physician to supervise the nursing care in his or her practice, A264 (ACOG Standards); A289 (PPFA Standards); A292-94, 296 (NAF Standards); *see also* A280 (ACOG Guidelines). Additionally, while the Regulation requires abortion providers to permit DHEC to copy and remove patient medical records, A212-13 (§102(F)), ACOG and NAF direct providers not to disclose any confidential patient information without the patient's consent. A273 (ACOG Guidelines); A298-99 (NAF Standards). Moreover, while the Regulation requires specific air exchange and filtration rates, utility sinks, and strict temperature controls, A254-55 (§807(L),(O)), the ACOG guidelines and NAF and PPFA standards contain no such mandates. A267 (ACOG Standards); A272 (ACOG Guidelines); A288 (PPFA Standards); A297 (NAF Standards). Finally, while the Regulation requires formal meetings and training programs, as well as extensive written policies and procedures, A216-17, 221-22, 223, 225, 240 (§§204(F), 205(B), 209(A), 501(A)), the ACOG and guidelines and NAF standards give physicians considerable flexibility to determine the degree to which such measures are appropriate for their practice. A266-67 (ACOG Standards); A270 (ACOG Guidelines); A297-98 (NAF Standards). Each of these differences between the Regulation and professional standards, far being minimal, is indicative of a significantly different model of

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address the maintenance of medical records or administration in an abortion facility.

health care: one (the professional standards) respects the professional judgment of the physician; the other (the Regulation) substitutes arbitrary government strictures in lieu thereof.

(2) The Fourth Circuit decision concludes, without explanation, that there is no evidence that women from the Beaufort area cannot drive seventy miles to Charleston to obtain an abortion. A15, A26. This conclusion directly contradicts the district court's findings that closure of Dr. Lynn's Beaufort office would, force women from that area to travel greater distances, and that such increased travel adds costs to abortion, which will cause some women to delay, and others to forgo, abortions, at the expense of their health. A148, 152-53. Again, the difference between an abortion provider remaining open in a region and being forced to close is critical.

(3) The Fourth Circuit concludes that "there is no evidence that the ability of any woman to obtain an abortion or to decide to obtain an abortion would be frustrated by" the costs imposed by the Regulation. A27. This conclusion directly conflicts with the district court's findings that the costs and other burdens imposed by the Regulation "will prevent a significant number of women from obtaining an abortion or, at a minimum, delay them from obtaining the abortion, both of which carry increased risks to the health of women." A148, *see also* A152. Here too there is a critical difference between concluding that burdens are mere inconveniences and that they are insurmountable obstacles for some women.

The Fourth Circuit's blatant disregard for the factual findings of the district court not only conflicts with this court's decisions, but so departs from the usual course of proceedings as to call for an exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a) and (c).

II. The Fourth Circuit's Determination that the Challenged Regulatory Classification Comports With Equal Protection Conflicts With Decisions of This Court and Other Courts of Appeals.

The Fourth Circuit's equal protection analysis of the Regulation is erroneous for two reasons. First, it fails to apply heightened scrutiny to the challenged classification. Second, it fails even to apply the rational basis test properly.

A. The Fourth Circuit Erroneously Applied Rational Basis Review to a Regulatory Scheme That Burdens the Right to Abortion.

This Court and the courts of appeals have repeatedly held that if a classification impinges on or penalizes a fundamental right, strict scrutiny must be applied to that classification. *See*; *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), ("any classification which serves to penalize the exercise of [a constitutional] right" must meet strict scrutiny); *id.* at 638 (because classification "touch[ed]" on fundamental right, it was subject to strict scrutiny); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) (strict scrutiny applied when government action "impinges" upon a fundamental right); *Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health,* 505 F.2d 1141, 1153 (7th Cir. 1974) (strict scrutiny applied where regulation's differential treatment of abortion and comparable medical procedures "adversely affect[ed]" right to abortion); *Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1122 (D.C. Cir. 1978) (en banc) (applying strict scrutiny to restriction on fundamental rights); *id.* at 1124 (Bazelon, J., concurring) (no need to decide if statute violates First Amendment because statute clearly violates equal protection guarantee under fundamental rights prong); *United States v. Craven*, 478 F.2d. 1329, 1338 (6th Cir. 1973) (strict scrutiny applies when legislative classifications "affect" fundamental rights); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996) (under

equal protection clause, case "involving the State's authority to sever permanently a parent-child bond" required "the close consideration the Court has long required when a family association so undeniably important is at stake"). Under strict scrutiny, the state must show that the challenged classification is necessary to serving a compelling state interest. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 499 (1999).

Where a classification impacts a constitutionally protected interest that does not rise to the level of a fundamental right, this Court has applied an intermediate level of scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-18, 221, 223-24 (1982) (applying intermediate scrutiny to classification that denied public education to the children of illegal aliens); *see also Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate level of scrutiny to a "quasi-suspect" classification based on gender); *Lalli v. Lalli*, 439 U.S. 259 (1978) (applying intermediate scrutiny to "quasi-suspect" classification based on illegitimacy). Under intermediate scrutiny, "[t]he State must show . . . that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*,518 U.S. 515, 533 (1996) (quotation omitted).

The Fourth Circuit's decision conflicts with these principles for two reasons. It holds that heightened scrutiny is only applied under the fundamental rights strand of equal protection analysis if a deprivation of the right has been established under the due process clause. It further suggests that classifications impacting the right to abortion are no longer subject to any heightened scrutiny whatsoever under the equal protection clause.

First, the Regulation singles out abortion providers from providers of all other comparable medical procedures and subjects them to regulations that are not tailored to the

particular needs of abortion patients, yet that impose costs and other burdens on women seeking abortions. Accordingly, the district court applied strict scrutiny to the regulatory classification, noting that the Regulation "applies only to abortion providers and directly impacts the exercise of a fundamental constitutional right." A191. The Fourth Circuit reversed because it concluded that a classification affecting the right to abortion is only subject to strict scrutiny review under equal protection analysis if it imposes an "undue burden" on that right. A31.[9] This conclusion is erroneous because analysis of whether a classification violates equal protection is independent of an analysis of whether a law violates the right to due process. *Supra* at 16-17. Indeed, if the Fourth Circuit's conclusion were correct, then the fundamental rights prong of equal protection analysis would be entirely irrelevant, for it would only be triggered where a constitutional violation had already been found.

Second, the decision below suggests that even if the Regulation violated the right to privacy, strict scrutiny may not apply under equal protection following *Casey*, 505 U.S. at 878. A30. The Fourth Circuit decision cites to no authority for the proposition that *Casey*, which did not engage in an equal protection inquiry, altered the fundamental rights prong of equal protection analysis. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (courts of appeals must follow Supreme Court precedent even if they suspect that such precedent may later be overruled). Moreover, *Casey* reaffirmed that the fundamental right to liberty encompasses a woman's decision whether to obtain an abortion prior to viability, *Casey*, 505 U.S. at 846, and

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[9] The Fourth Circuit's reliance on *Harris v McRae* in this regard is misplaced. The *Harris* Court declined to apply heightened equal protection scrutiny to the funding scheme before it because it found that the scheme did not affect the exercise of a fundamental right at all. *See Harris v. McRae*, 448 U.S. 297, 316-18, 322-23 (1980).

subsequent decisions of this Court continue to recognize the constitutionally protected status of the right to choose. *See, e.g.*, *Carhart*, 120 S. Ct. at 2604 (guarantee of fundamental individual liberty protects a woman's right to choose an abortion); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (referring to the right to choose abortion as one of "certain fundamental rights and liberty interests . . . specially protected by the Due Process Clause"); *id.* at 727-28 (distinguishing assisted suicide from abortion because the former did not implicate a fundamental right).

The fact that an undue burden test applies in the due process context does not mean that strict scrutiny cannot logically be applied under the fundamental rights prong of equal protection analysis. Indeed, application of different tests under those two clauses with respect to a single constitutional right is not unprecedented; this Court has done so with respect to the right to vote. Under the due process clause, not every voting restriction amounts to infringement of the right, and the states are given flexibility to establish voting schemes. *Casey*, 505 U.S. at 873-74. Nevertheless, in the equal protection context, this Court has applied strict scrutiny analysis to determine whether burdens on one group's right to vote in state elections are unconstitutional. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 633, 670 (1966). Moreover, application of different tests in due process analysis and in the fundamental rights strand of equal protection analysis reflects the different concerns addressed by those two constitutional protections. The due process clause prevents the state from impairing certain protected rights any more than is justified by the state's own countervailing important interests. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *see also Furman v. Georgia*, 408 U.S. 238, 359 (1972) (Marshall, J., concurring). By contrast, the equal protection clause prevents the state from unnecessarily singling out particular groups "where the rights of persons are at stake." *Romer v. Evans*, 517 U.S. 620, 623

(1996); *see also Harper*, 383 U.S. at 670; Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1457 (2d ed. 1988). Thus, this Court's decision in *Casey* necessitates no change in the equal protection analysis of classifications that impinge on the right to abortion.

But even if *Casey* reduced the right to abortion to something less than a "fundamental" right for equal protection purposes, it certainly would not change the equal protection analysis to rational basis review. The right to abortion unquestionably remains a constitutionally protected component of a women's liberty interest, *Casey*, 505 U.S. at 846. At a minimum, the right remains a "quasi-fundamental" one, subject to some degree of heightened scrutiny. The Fourth Circuit's failure to apply at least an intermediate level of scrutiny to the Regulation's differential treatment of abortion providers and patients conflicts with black-letter equal protection analysis.

The decision below also conflicts with decisions of other courts of appeals, which have concluded, under heightened scrutiny, that singling out abortion for the imposition of requirements that are equally relevant to comparable medical procedures is unconstitutional. *See Mahoning Women's Ctr. v. Hunter*, 610 F.2d 456, 460 (6th Cir. 1979), *vacated on other grounds*, 447 U.S. 918 (1980) ("compelling reason for singling out and imposing such onerous performance restrictions on [abortion]"); *Friendship Med. Ctr. v. Chicago Bd. of Health*, 505 F.2d 1141, 1153 (7th Cir. 1974) (invalidating "health" regulations that treated abortion differently than "medical procedures which in terms of health risks are not distinguishable"); *see also Word v. Poelker*, 495 F.2d 1349, 1352 (8th Cir. 1974) (striking requirements for abortion providers "not based upon differences that are reasonably related to the purposes of the act").

B. The Fourth Circuit Erroneously Upheld the Challenged Regulatory Classification Despite its Lack of a Rational Relationship to the Regulation's Objective.

The Fourth Circuit also erred in its application of the rational basis test in this case. As this Court has emphasized, "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Further, courts must carefully question classifications that serve to disadvantage politically unpopular groups because such classifications "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634.

There is no question that a variety of other outpatient medical procedures are comparable to first-trimester abortion in all respects relevant to the requirements of the Regulation. *Supra* at 4. These procedures include the completion of spontaneous abortion, which is essentially identical to the performance of an induced suction curettage abortion, except for the fact that the woman has not chosen to terminate her pregnancy. *Supra* at 4. Yet the Regulation singles out first-trimester abortion providers and patients from providers and patients of those other procedures and subjects them to unique, medically unnecessary burdens that are not tailored to any particularities of abortion. *Supra* at 6-9.

The district court concluded that "[t]he onerous, and largely unnecessary, requirements of this regulation are neither 'narrow enough in scope [nor] grounded in a sufficient factual context for [the court] to ascertain that there existed some relation between the classification and the purpose it [is now alleged] to serve.'" A197 (quoting *Romer*, 517 U.S. at 632-33). The district court also noted that "[t]he fact that the regulation was directed towards a politically

unpopular group in the absence of any existing public health problem only bolsters this conclusion." A197.

The court below reversed, drawing the blanket conclusion that "for purposes of regulation, abortion services are rationally distinct from other routine medical services, if for no other reason than the particular gravitas of the moral, psychological, and familial aspects of the abortion decision [thus,] South Carolina has a rational basis for regulating abortion clinics while not regulating other healthcare facilities." A32-33.[10] But, not only does the Regulation fail to address these aspects of the procedure, the Respondents have not claimed that the Regulation serves such interests.[11]

By concluding that South Carolina's discriminatory treatment of abortion providers and patients is rational without ever examining the relationship between that classification and the object to be obtained by the Regulation, the Fourth Circuit subjects the Regulation to a scrutiny even more deferential than rational basis review. In effect, the decision below holds that any law singling out abortion, regardless of the law's aims, purpose, or effect, will satisfy

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[10] The court below also upheld the Regulation's singling out of regular abortion providers from occasional abortion providers for imposition of health regulations not tailored to any particular needs of patients of regular abortion providers. The upholding of this classification conflicts with *Romer* in that it bears no rational relationship to promoting maternal health and clearly disadvantages a particularly unpopular group, namely regular abortion providers. *Romer*, 517 U.S. at 634-35. The Fourth Circuit's conclusion that the classification is rationally related to the state's interest in regulating facilities "in the business of providing abortions," A33, conflicts with this Court's decisions in *Roe* and *Casey*, which have only recognized the two legitimate state interests in connection with abortion: potential life and maternal health. *Casey*, 505 U.S. at 900; *Roe v. Wade*, 410 U.S. 113, 163 (1973).

[11] The only way the Regulation might serve the state's interest in potential life is by impermissibly hindering women from obtaining abortions. *Casey*, 505 U.S. at 878 ("measures [to promote the state's interest in potential life] must not be an undue burden on the right").

the requirements of equal protection. This Court has never permitted such deference in any equal protection case, let alone one where the challenged law disadvantages a constitutionally protected right or politically unpopular group. *See, e.g., Romer*, 517 U.S. at 634-35 (and cases cited therein); *see also Doe v. Bolton*, 410 U.S. 179, 194 (1973) (hospital accreditation requirement applied only to abortion "does not withstand constitutional scrutiny. . . . It . . . simply is not based on differences that are reasonably related to the purposes of the Act in which it is found.") (quotation omitted). Further, the decision below fails to acknowledge the illegitimacy and irrationality of imposing generalized health requirements on a tiny and unpopular fraction of the medical community. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) ("nothing opens the door to arbitrary action so effectively as to allow [government] officials to pick and choose only a few to whom they will apply legislation") (quotation omitted).

III. By Upholding Unduly Burdensome, Medically Unnecessary Regulations on Abortion Providers, the Fourth Circuit's Decision Conflicts With Decisions of This Court and Other Courts of Appeal.

The Fourth Circuit's privacy analysis conflicts with the decisions of this Court and other courts of appeals in three ways. First, the court below upheld a Regulation that threatens maternal health, departs from accepted medical practice, and imposes substantial, medically unnecessary, undue burdens on abortion. Second, the court below held that the Constitution protects only a woman's decision to have an abortion, not her ability to implement that decision. Third, the court below held that facial challenges to abortion restrictions must meet the "no circumstances" test of *United States v. Salerno*, 481 U.S. 739, 745 (1987), rather than the "large fraction" test of *Casey*, 505 U.S. at 895.

A. The Decision Below Upholds a Regulation That Threatens Maternal Health, Departs From Accepted Medical Practice, and Imposes an Undue Burden.

First, in determining whether restrictions on abortion violate a woman's right to privacy, this Court and other courts of appeals initially assess whether those laws serve a legitimate state interest. *See Casey*, 505 U.S. at 887-898 (striking spousal notice provision that would harm women seeking abortions); *Hodgson*, 497 U.S. at 450-455 (striking down two-parent notice requirement for abortion because it did not serve a legitimate state interest); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 487-90 (1983) (weighing costs of pathology test against its "substantial benefits" after finding that requirement would serve an interest in health); *Planned Parenthood v. Danforth*, 428 U.S. 52, 77-79 (1976) (striking method ban that would increase costs and limit the availability of abortions without promoting maternal health); *Planned Parenthood v. Doyle*, 162 F.3d 463, 470-71 (7th Cir. 1998) ("partial-birth" abortion ban's failure to serve maternal health or potential life rendered it unconstitutional), *vacated, Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *vacated, Christensen v. Doyle*, 120 S. Ct. 2739 (2000).

The district court found that the Regulation "was not designed to and does not further the state's legitimate interest in maternal health. . . . DHEC officials . . . have gone too far -- imposing costly requirements that are at best unnecessary and at worst contrary to accepted medical practice." A174; *see also* A176-81 (providing examples of unnecessary and burdensome requirements). Moreover, the district court found that by unjustifiably hindering women's access to abortion services, the Regulation will "serve to increase health risks and diminish the safety of women seeking abortions in South Carolina." A182.

The Fourth Circuit rejected these conclusions, deciding instead that because some parts of the Regulation are similar to guidelines of national medical groups,[12] *a fortiori* the Regulation as a whole represents a reasonable effort to promote maternal health. A23. Having thus determined that DHEC *tried* to design a regulation that would promote maternal health, the Fourth Circuit ends its inquiry into the Regulation's relationship to a legitimate state interest. A27 ("the increased costs claimed by the three abortion providers are particularly modest when one considers that their *purpose* is to protect the health of women seeking abortions") (emphasis added).[13] As a result, the Fourth Circuit simply never evaluated whether the Regulation will serve the state's interest in maternal health, and it ignored the district court's finding that the Regulation will have the opposite effect of harming women's health. This failure to assess whether the Regulation would in fact further maternal health, and whether the Regulation's promotion of that interest justifies the burdens it imposes, conflicts with this Court's decisions. *Supra* at 24.

Second, this Court has repeatedly affirmed that restrictions on the provision of abortion may not depart from accepted medical practice. *See, e.g.*, *Simopolous*, 462 U.S. at 516 (the state's "discretion [to regulate in furtherance of maternal health] does not permit it to adopt abortion regulations that depart from accepted medical practice"); *Akron*, 462 U.S. at 431 (same); *Danforth*, 482 U.S. at 77-79

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[12] For the reasons already discussed, *supra* at 12-15, this conclusion rests on the Fourth Circuit's substitution of its own factual theories for the district court's finding that the Regulation goes beyond and conflicts with medical guidelines and accepted medical practice.

[13] *Simopolous v. Virginia*, 462 U.S. 506 (1983), relied on by the Fourth Circuit, is inapposite. Simopolous did not present any evidence that the law at issue would not promote maternal health; indeed, he did not challenge the constitutionality of the law as it was interpreted by the court. *Id.* at 517-18.

(striking down method ban that conflicted with accepted medical practice); *cf. Ashcroft*, 462 U.S. at 487 (upholding pathology testing requirement after finding that it comported with accepted medical practice).

On the basis of all of the medical evidence presented in this case, the district court struck down the Regulation because its requirements "are at best medically unnecessary and at worst contrary to accepted medical practice." A174.[14] Despite the decisions of this Court, which assess not only whether an abortion restriction "comports with" accepted medical practice, but also whether it departs from, or goes beyond it, the Fourth Circuit reversed without assessing whether the Regulation departs from accepted medical practice. Instead, it presumed that because "the bulk of the [Regulation's] provisions comport with" national guidelines, the Regulation is constitutionally acceptable. A23-24.

Third, under this Court's decision in *Casey*, a law that imposes an undue burden is one that, "in a large fraction of the cases in which [it] is relevant," 505 U.S. at 895, "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," *id.* at 877. This Court and the United States Court of Appeals for the Seventh Circuit have both recognized that a law that increases the cost of providing or obtaining an abortion may impose an undue burden. *Casey*, 505 U.S. at 901 ("at some point increased cost could become a substantial obstacle"); *Ragsdale v. Turnock*, 841 F.2d 1358, 1370 (7th Cir. 1988) (regulations causing a $25 to $40 increase in the cost of an

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[14] The Fourth Circuit's conclusion in this regard rests on that court's faulty premise, discussed earlier, *supra* at 12-15, that the Regulation does not conflict with national medical guidelines. The Fourth Circuit's conclusion also rests on an erroneous assumption that medical guidelines alone can describe accepted medical practice. This assumption conflicts with the district court's common-sense finding that a physician's procedures and facilities may be medically acceptable and yet not comport with a particular set of national guidelines. *Supra* at 7.

abortion substantially burdened a woman's right to have an abortion). In *Ragsdale*, the Seventh Circuit also held that decreasing the availability of abortions by causing the closure of an abortion provider or by requiring physicians to perform unnecessary medical tests on abortion patients each impose impermissible burdens. 841 F.2d at 1370, 1372. Moreover, this Court has only upheld increased costs on the provision of abortion where those costs were justified by the service of a legitimate state interest. *Compare Ashcroft*, 462 U.S. at 487-490 (costs of pathology test justified by "substantial benefits" of test to maternal health) *with Danforth*, 428 U.S. at 77-79 (striking down method ban that would have increased the costs and limited the availability of abortions without promoting important health benefits).

As the district court found, the Regulation will impose substantial unnecessary costs on abortion, force abortion patients to undergo unnecessary medical tests, threaten patient confidentiality, and cause the closure of the only abortion provider in the Beaufort area. *Supra* at 8-9. As a result, the district court found that a significant number of women will delay or forgo abortions at the expense of their health. *Supra* at 8-9. Accordingly, the district court concluded that "the overwhelming and credible evidence reveals that the regulation is medically unnecessary and that its costs and other burdens, which the court concludes are indeed undue, are not justified by the state interests in protecting the health of the women undergoing the procedure." A186. The Fourth Circuit reversed, disregarding the district court's factual findings and giving only cursory consideration to the various burdens imposed by the Regulation.[15] *Compare* A28 *with* A183-184. Further, in evaluating the Regulation's burdens, the court below

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[15] Notably, the Fourth Circuit erroneously concluded that the Regulation requires DHEC to keep patient information confidential. A28. In fact, the Regulation imposes that obligation only on the abortion providers, not on DHEC. A212-13 (§ 102(F)(2)).

considered the impact of cost increases only on patients of the two abortion facilities *least affected* by those increases, ignoring the impact of cost increases on Dr. Lynn's Greenville patients, who face an additional of $93-$170 per procedure. A19. This analysis conflicts with *Casey*, which requires evaluation of a law's impact on "the group for whom the law is a restriction." *Casey*, 505 U.S. at 894. The Fourth Circuit also held that a burden is only undue if it amounts to a virtual ban on abortion. A19 (stating that only when increased costs are "prohibitive" do they amount to an undue burden). The Fourth Circuit's application of this standard to the burdens imposed by the Regulation conflicts with both *Casey* and *Ragsdale*. *See supra* at 26-27.

B. The Fourth Circuit's Decision Recognizes a Right to Privacy Only in the Abortion *Decision* and Not in the *Implementation* of that Decision.

The decisions of this Court have recognized that a woman's liberty interest protects not only her decision to choose an abortion, but also her ability to implement that decision. For example, just this past term, this Court struck down an abortion method ban that did not directly affect a woman's decision to have an abortion, but restricted her ability to implement that decision. *Carhart*, 120 S. Ct. at 2609; *see also Danforth*, 428 U.S. at 77-79 (striking down method ban); *Akron*, 462 U.S. at 434-35 (striking down second-trimester hospitalization requirement). Similarly, *Casey* prohibited restrictions that "place a substantial obstacle in the path of a *woman seeking an abortion*." 505 U.S. at 877 (emphasis added). Decisions of the courts of appeals have also recognized that the right to privacy protects a woman's ability to carry out her decision to terminate a pregnancy. *See, e.g., Planned Parenthood of Central New Jersey v. Farmer*, Nos. 99-5042 & 99-5272, 2000 WL 1025617 (3d Cir. July 26, 2000) (striking down method ban which did not directly affect decision to have an abortion, but restricted physician's ability to carry out that decision);

Planned Parenthood v. Miller, 195 F.3d 386, 389 (8th Cir. 1999) (same); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117 (10th Cir. 1996) (striking down ban on post-20 week abortions); *Friendship*, 505 F. 2d at 1153 (striking down regulations on abortion providers); *Mahoning*, 610 F. 2d at 460 (same); *Poelker*, 495 F. 2d at 1352 (same).

Contrary to these decisions, the court below improperly narrowed the right to abortion. The court presumed that a woman's right to privacy only prevents the state from unduly burdening a woman's *decision* to obtain an abortion, but not her *ability* to obtain an abortion. A18 (characterizing the right to abortion as the "abortion-decision right"); A125 (the focus of the undue burden analysis is on interference with the woman's decision rather than on costs imposed on the procuring of an abortion); A27 (considering only burdens on the "woman's ability to make an abortion decision" rather than her ability to obtain one). As a result, the court failed to properly consider the obstacles that the Regulation places in the path of women seeking to implement their decisions to obtain abortions in South Carolina.

C. The Fourth Circuit Concluded that the *Salerno*, rather than *Casey*, Standard Applies to Facial Challenges to Abortion Restrictions.

As the dissent below recognized, when addressing facial challenges to abortion restrictions, this Court applies the "large fraction" test annunciated in *Casey*, rather than the "no set of circumstances" test articulated in *Salerno*, 481 U.S. at 745. A77 (dissent) ("The Salerno/Casey question was finally resolved by the Supreme Court in Stenberg v. Carhart"); *see Carhart*, 120 S. Ct. at 2608-17 (facially invalidating ban on "partial-birth" abortion without applying *Salerno* test); *Casey*, 505 U.S. 894-95. Virtually every other circuit to have ruled on the question has followed this Court in applying the *Casey* test in facial abortion challenges. *See Farmer*, Nos. 99-5042 & 99-5272, 2000 WL 1025617 (3d Cir. July 26,

2000); *Planned Parenthood v. Lawall,* 180 F.3d 1022, 1027 (9th Cir. 1999); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 195-96 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998); *Jane L.*, 102 F.3d at 1116; *Planned Parenthood v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995). *But see Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992). Nonetheless, the Fourth Circuit concluded that the *Salerno* standard should be applied to facial challenges to abortion restrictions. *Greenville*, A14-16. This conclusion conflicts with the overwhelming authority of this Court and other courts of appeals.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their petition for a writ of certiorari.

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